Federal Court of Appeal | Cour d'appel fédérale

Date: 20191018

Docket: A-385-19

Citation: 2019 FCA 259

CORAM: **NOËL C.J.**
STRATAS J.A.
BOIVIN J.A.

BETWEEN:

RAINCOAST CONSERVATION FOUNDATION
and LIVING OCEANS SOCIETY

Appellants

and

ATTORNEY GENERAL OF CANADA
and TRANS MOUNTAIN PIPELINE ULC

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on October 18, 2019.

REASONS FOR ORDER BY: STRATAS J.A.

CONCURRED IN BY: NOËL C.J.
BOIVIN J.A.

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REASONS FOR ORDER

STRATAS J.A.

[1] On September 4, 2019, this Court issued an order denying the appellants and others leave to start a judicial review of the Governor in Council's approval of the Trans Mountain expansion project: *Raincoast Conservation Foundation v. Canada (Attorney General)*, 2019 FCA 224.

Some other parties were partly successful: they were granted leave to start a judicial review but only on certain issues. Other issues were prohibited.

[2] Soon afterward, one of the partly successful parties, Tsleil-Waututh Nation, brought a judicial review that tried to raise prohibited issues. It explained that it was trying to appeal the prohibitions contained in the Court's order in *Raincoast Conservation* to this Court. In detailed reasons, this Court explained that appeals do not lie from this Court to this Court: *Ignace v. Canada (Attorney General)*, 2019 FCA 239. It allowed Tsleil-Waututh Nation to amend its judicial review in order to comply with the Court's order in *Raincoast Conservation*.

[3] In the face of *Ignace*, the appellants now appeal the Court's order in *Raincoast Conservation* to this Court. In response, this Court has called for a review of this under Rule 74. As part of the review, it drew *Ignace* to the attention of the parties and called for written representations. This Court has considered the parties' representations.

[4] I would terminate the appeal. *Ignace* is directly on point and governs this review. *Ignace* could not be clearer: appeals cannot be brought from this Court to this Court (at paras. 19-29). And, as *Ignace* points out, this has been settled for a long time. The appellants never should have brought this appeal.

[5] The appellants try to distinguish *Ignace*. They note that in *Ignace*, Tsleil-Waututh Nation alleged bias against the judge conducting the Rule 74 review and in this case no such allegation

is being made. This is not a salient distinction. The central holding of *Ignace*—appeals cannot be brought from this Court to this Court—applies full force to this appeal.

[6] The appellants submit that the combination of sections 3 and 27 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 and section 55 of the *National Energy Board Act*, R.S.C. 1985, c. N-7 create an implied right to appeal from this Court to this Court.

[7] *Ignace* could not be clearer in rejecting an implied right to appeal generally and under this statutory regime (at paras. 19, 21 and 27): "there is no implied or express authorization of any appeal from an order of this Court to this Court", "an appeal from this Court to this Court…does not lie", and "[t]his Court never sits in appeal of itself." As well, an implied right cannot exist in the face of clear language to the contrary or in the absence of any language at all. Section 27, one of the sections cited by the appellants, explicitly provides for appeals from the Federal Court and the Tax Court, not this Court. The other two sections cited by the appellants do not speak to appeals at all.

[8] The appellants cite *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575 at para. 70 for two propositions: "a statutory body enjoys not only the powers expressly conferred upon it, but also by implication all powers that are reasonably necessary to accomplish its mandate" and "the powers of a statutory court or tribunal extend beyond the express language of its enabling legislation to the powers necessary to perform its intended functions". These propositions are undoubtedly true: see also *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722, 60 D.L.R. (4th) 682; *Chrysler*

Canada Ltd. v. Canada (Competition Tribunal), [1992] 2 S.C.R. 394, 92 D.L.R. (4th) 609. But as *Ignace* points out (at para. 21), there would have to be some statutory language to support an implication that this Court can somehow hear an appeal from itself and there is none "in the *Federal Courts Act* and the *Federal Courts Rules*, or in any other legislation for that matter."

[9] The appellants cite *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, 157 D.L.R. (4th) 385 at para. 36 for the proposition that "[w]ithin the sphere of control and exercise of powers over administrative decision-makers, the powers conferred on the Federal Court by statute should not be interpreted in a narrow fashion." Again, this proposition is undoubtedly true. But there are no powers conferred on this Court to hear an appeal from an order of this Court. As *Ignace* explains (at para. 24), appeals cannot be "created out of thin air."

[10] In their representations, the appellants set out policy views, some of which they unsuccessfully asserted in *Raincoast Conservation*, above, and urge them again upon us, perhaps in the hope that we might depart from *Ignace*. They want the National Energy Board's environmental reports to be brought to court immediately by way of judicial review rather than waiting for the Governor in Council's overall decision on approval. They want the standards in the *Species at Risk Act*, S.C. 2002, c. 29 and the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52 to foreclose the Governor in Council from approving a project, rather than to be just factors the Governor in Council weighs in its public interest decision. They want to appeal from this Court to this Court because the Supreme Court seldom grants leave to appeal. They want the decision of a single judge "in a case of this importance" to be fully reviewable, not "immunized from appeal".

[11] But, as is about to be explained once again, none of these policy views are the policies Parliament has chosen to implement in its law. We must apply Parliament's law, not the personal policy views urged by the parties or our own personal policy views: *Canada (Citizenship and Immigration) v. Ishaq*, 2015 FCA 151, [2016] 1 F.C.R. 686 at para. 26. Our judicial oath requires no less.

[12] This Court has put it this way:

> We are a court of law whose judges have sworn to obey the law in a democracy governed by the rule of law; we are not free agents putting our personal policies into law. We do not make statutory law; we interpret and apply the law made by Parliament. We look at Parliament's law to discern its real meaning; we do not look to our own policy preferences, our own worldviews, the opinions of the powerful, or the views of the public. We apply the real meaning of laws to the facts before us, neutrally and objectively, logically and dispassionately, without fear or favour, and come to a result; we do not skew the result to fit what we think is right or best, to advance values we prefer, or to meet the wishes and expectations of others. See *Williams v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 252 at paras. 41-52; *Canada v. Cheema*, 2018 FCA 45 at paras. 77-80.

(*Sharif v. Canada (Attorney General)*, 2018 FCA 20 at para. 51.)

[13] The law that governs this matter was enacted in 2012. At that time, Parliament prioritized the construction of pipeline projects and economic development. In pursuit of those policies, it passed a law to streamline the environmental assessment and approval process for pipeline projects: see the *Jobs, Growth and Long-term Prosperity Act*, S.C. 2012, c. 19 which, among other things, reformed the *National Energy Board Act*. Under this law, Parliament gave the Governor in Council—and no one else—the power to consider a wide range of matters, including environmental, economic and technical factors and recommendations set out in a

report prepared by the National Energy Board, and to decide whether, on balance, the pipeline project should be approved. As well, under this law, only the Governor in Council's decision can be challenged by way of judicial review, not the earlier report of the National Energy Board; as a result, case law under other legislative regimes suggesting the availability of immediate judicial review following an environmental assessment report does not apply. To further streamline the process, Parliament provided that judicial reviews can be brought only with leave given by a single judge of this Court. Finally, Parliament declined to create an appeal route from this Court's leave decision.

[14] In 2019, Parliament passed a new law: *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*, S.C. 2019, c. 28 (formerly Bill C-69). This new law changes the process for approving pipelines, placing greater priority on, among other things, environmental protection. But the 2012 law still applies to the Trans Mountain expansion project.

[15] This Court set out the definitive meaning and effect of the 2012 law in *Gitxaala Nation v. Canada*, 2016 FCA 187, [2016] 4 F.C.R. 418 at paras. 119-127, leave to appeal to SCC refused, 37201 (9 February 2017). Since *Gitxaala*, this has been relitigated, and relitigated again, and then again and again: *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153, [2018] 3 C.N.L.R. 205 at paras. 173-203, leave to appeal to SCC refused, 38379 (2 May 2019) (where this Court reaffirmed *Gitxaala* and rejected submissions that it should be cast aside under

Miller v. Canada (Attorney General), 2002 FCA 370, 220 D.L.R. (4th) 149); *Raincoast Conservation*, above at paras. 38-44; *Ignace*, above at para. 36; and now this case.

[16] The policy choices expressed by Parliament in its 2012 law no doubt frustrate the appellants and others. But they should express their frustration at the ballot box or by other lawful and democratic means—not by relitigating points already decided.

[17] Relitigation is especially unwelcome when it has the potential to inject uncertainty into other proceedings and disrupt them. Here, a large and complicated consolidated proceeding challenging the Governor in Council's approval of the Trans Mountain expansion project is well underway (lead file A-321-19). Given the public interest in a prompt determination, it is progressing under a very tight schedule in this Court, a record for a case of this size and complexity. The issues in that case were defined in *Raincoast Conservation* some time ago and an extremely large evidentiary record is already nearing completion. To try to relitigate the definition of the issues in this case after *Ignace* quashed an illegitimate attempt to relitigate this point is utterly unacceptable.

[18] I appreciate that the appellants and others are passionate about their causes and dedicated to them. But passion and dedication can never justify disrespect for the rule of law. The rule of law requires those seeking the judgment of the Court to accept the judgment of the Court even when it is not to their liking.

[19] To this principle, there is only one exception: a party can always pursue legal recourses against a judgment. One recourse that has been available to the appellants for a few weeks now, as yet untaken, is an application for leave to appeal from this Court's order in *Raincoast Conservation* to the Supreme Court: *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 40. Another potential recourse, a motion to this Court for reconsideration, a stay, variation or setting aside under Rules 397-399 of the *Federal Courts Rules*, is not available to the appellants in these circumstances. Nothing has been overlooked in *Raincoast Conservation* and there has been no relevant change in circumstances since.

[20] The respondent Trans Mountain Pipeline submits that this purported appeal attempts to relitigate both the denial of leave in *Raincoast Conservation* and the holding in *Ignace* and, thus, is an abuse of process twice over. I agree.

[21] The respondents are entitled to costs for the preparation of their written representations. The respondent Trans Mountain Pipeline ULC suggests $1,000 is the appropriate amount. In the circumstances, this is generous. If asked, I would have considered a higher award of costs and perhaps even an award of costs of a different sort to condemn the appellants' abuse of process. The respondent Attorney General did not suggest an amount but in my view it cannot receive more than Trans Mountain Pipeline ULC.

[22] Therefore, the notice of appeal should be removed from the court file and the court file closed. I would award each respondent its costs in the amount of $1,000, all-inclusive, payable forthwith.

"David Stratas"
J.A.

"I agree
Marc Noël C.J."

"I agree
Richard Boivin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-385-19
STYLE OF CAUSE:	RAINCOAST CONSERVATION FOUNDATION AND LIVING OCEANS SOCIETY v. ATTORNEY GENERAL OF CANADA AND TRANS MOUNTAIN PIPELINE ULC

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
CONCURRED IN BY:	NOËL C.J. BOIVIN J.A.
DATED:	OCTOBER 18, 2019

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